STATE OF MICHIGAN

COURT OF APPEALS

NANCY JACQMAIN,

Plaintiff-Appellant,

v

MELRU CORPORATION, d/b/a JONES NEW YORK STORES, CINDY ROBINSON, and LAURIE EVERETT,

Defendants-Appellees.

UNPUBLISHED
May 6, 2003

No. 234610
Saginaw Circuit Court
LC No. 99-026560-NZ

Before: Donofrio, P.J., and Saad and Owens, JJ.

PER CURIAM.

In this employment related litigation, plaintiff appeals as of right orders granting summary disposition in favor of defendants pursuant to MCR 2.116 (C)(10), on issues of termination for just cause. Plaintiff further appeals from a judgment on verdict for the defendants on plaintiff's age discrimination claim. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff first argues the trial court erred in granting summary disposition to defendants on plaintiff's theory of the existence of an express employment contract of termination for just cause only. Plaintiff asserts the testimony taken during discovery established a material issue of fact on the creation of such a contract to defeat the motion.

This Court reviews de novo a trial court's grant of summary disposition. *Spiek v Transportation Dep't (On Remand)*, 456 Mich 331, 337; 572 NW2d 201 (1998). To overcome the presumption of employment at will, a plaintiff must show a provision forbidding discharge absent just cause. *Rood v General Dynamics Corp (On Remand)*, 444 Mich 107, 117; 507 NW2d 591 (1993), citing *Rowe v Montgomery Ward*, 437 Mich 627, 636-637; 473 NW2d 268 (1991). In evaluating whether oral assurances create an express contract, the court must consider all relevant circumstances, including written and oral statements and conduct manifesting intent. *Rowe*, *supra* at 639-640. Oral statements of job security must be clear and unequivocal. *Id.* at 645. In order for oral representations to rise to the level to remove the employment relationship from one of at-will and create an agreement for just-cause employment, the employee must demonstrate both negotiation for job security and assent by the employer to terminate only for

cause. *Bracco v Michigan Technological University*, 231 Mich App 578, 598; 588 NW2d 467 (1998).

To find mutual assent, courts must focus on "how a reasonable person in the position of the promisee would have interpreted the promisor's statements or conduct." *Rood, supra* at 119. In testing the factual support of a plaintiff's claim under 2.116(C)(10), "[t]he court is not permitted to assess credibility, or to determine facts. " *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994), citing *Zamler v Smith*, 375 Mich 675, 678-679; 135 NW2d 349 (1965). "Instead, the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Skinner, supra* at 161.

Plaintiff offers her own testimony in opposition to the motion for summary disposition. The evidence is viewed in the light most favorable to the opposing plaintiff. She testified to a singular meeting with defendant's regional manager. In that meeting there was a general discussion of store operations, sales goals, and wages as plaintiff was considering the manager position. In her deposition plaintiff relates that job security was important to her in as much as she was leaving existing employment. The testimony was however, somewhat equivocal on that point. When her counsel asked her about the concept of job security and just-cause employment, she reported that the regional manager discussed "good or just reason" in the context of job compliance. Defendant's manager said, "you could work for this company as long as you met your goals and showed the company that you could do a good job." While the employee handbook and job compliance form referred to conduct guidelines and grounds for dismissal respectively, neither document stated that an employee would be released for just cause only.

Based on our review of the record, we find that plaintiff presented insufficient evidence to raise a justiciable question of fact on the issue of an express contract. The oral statements made and conduct at plaintiff's interview do not clearly and unequivocally constitute assent to a just-cause employment contract. Therefore, the trial court did not err when it granted defendant's motion for summary disposition on the express contract theory.

Plaintiff next argues the trial court erred by granting summary disposition to defendants because the only evidence defendants produced showing reasonable notice of the change from just-cause to at-will employment was an affidavit based on inadmissible hearsay. We agree.

For purposes of summary disposition only, defendants acknowledge a legitimate expectation of just-cause employment existed when plaintiff was hired. However, even where just-cause employment is based on legitimate expectations, "an employer may . . . unilaterally change its written policy from [just-cause] to [at-will], [if] the employer gives affected employees reasonable notice of the policy change." *Bankey v Storer Broadcasting Co (In re Certified Question)*, 432 Mich 438, 441; 443 NW2d 112 (1989).

Written statements by a district manager, offered to prove the at-will policy was discussed with store managers, where the form was filled out completely by the district manager, and nobody at the company could confirm its authenticity, are inadmissible. MRE 801(c). Our review of the record reveals that defendants produced no admissible evidence showing they distributed the policy, and plaintiff denied receiving it. Plaintiff received the new corrective action policy stating, "[t]his policy does not change the Melru Employment-at-Will Policy," and

employment applications revised to include the at-will policy. However, this statement was not on the application plaintiff signed. Plaintiff believed, because she was told she was a "just-cause" employee in her employment interview, that the at-will policy only applied to new employees.

For these reasons, we find that whether the reference to the at-will policy in the corrective action policy and its restatement in the employment application constituted reasonable notice to the plaintiff was a question of fact for a jury.

Plaintiff next argues the trial court abused its discretion when it allowed defendants to introduce company-wide statistical data because the employees were not similarly situated as plaintiff. We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *Gillam v Lloyd*, 172 Mich App 563, 586; 432 NW2d 356 (1988). Evidence is relevant if it has a tendency to prove the existence of a fact material to the case. *Dep't of Transportation v Van Elslander*, 460 Mich 127, 129; 594 NW2d 841 (1999).

We have reviewed the issue and do not find the case law presented by plaintiff persuasive. Therefore we find that the trial court was within its discretion when it determined the statistical chart was relevant to defendants' defense, and its probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Plaintiff next argues a new trial should be granted because the trial court allowed defense counsel to repeatedly place plaintiff counsel's credibility at issue, and to distract the jury from the issues. We disagree. This Court reviews for an abuse of discretion a trial court's decision to allow counsel's argument over the objections of opposing counsel. *Hunt v Freeman*, 217 Mich App 92, 97; 550 NW2d 817 (1996).

In *Reetz v Kinsman Marine Transit*, 416 Mich 97, 103; 330 NW2d 638 (1982), the Supreme Court laid out the review process for appeals based on improper comments:

> [T]he appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court . . . . must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted.

Courts have found the following comments made during closing arguments to be error, but have found these errors curable by an instruction: (a) an untrue statement regarding the plaintiff's right to compensation, *Reetz, supra* at 104; and (b) a single remark abusing opposing counsel. *Bd of Co Road Comm'rs of Wayne v GLS LeasCO, Inc*, 394 Mich 126, 131; 229 NW2d 797 (1975). These statements are analogous to those in the case at hand. Defendants' comments that plaintiff's testimony was scripted without factual proof or an inference from another fact

were error. However, after reviewing the record, we find that the error was cured by the court's instruction that comments by counsel were not evidence. *Reetz, supra*, 416 Mich at 106.

Plaintiff next argues the court erred by permitting defendant to compare plaintiff's conduct to that of a dismissed juror in a calculated attempt to inflame the jury. We agree. During closing arguments, as defense counsel was discussing plaintiff's attendance policy, he likened plaintiff's conduct to that of the juror who was dismissed by the court for sleeping. At the end of defense counsel's closing arguments, plaintiff's counsel objected to the closing statement as being inflammatory. The court stated that it would get to that later but never did. Plaintiff's counsel then addressed, in rebuttal, plaintiff's attendance policy. The court, in its jury instructions, informed the jury that arguments of counsel were not to be considered as evidence. Because plaintiff did not request a specific instruction or a mistrial on this point of error, this issue was not preserved for appeal. *Reetz, supra,* 416 Mich at 100-102. However, under MRE 103(d), this Court may take notice of plain errors if they affect a party's substantial rights. *Kubisz v Cadillac Gage,* 236 Mich App 629, 637; 601 NW2d 160 (1999).

"Any attempt to appeal to the jurors' self-interest by suggesting what the consequences of the verdict would mean to them personally constitutes error requiring reversal." *Duke v American Olean Tile Co*, 155 Mich App 555, 563; 400 NW2d 677 (1986), citing *Clark v Grand Trunk WR Co*, 367 Mich 396, 400; 116 NW2d 914 (1962). In this case, a member of the jury, who worked nights, had been sleeping through much of the trial. His snoring was so annoying that one of the jurors sought out the judge and asked that the juror be removed. This was toward the end of the trial. The judge dismissed the juror the day before closing arguments. Defense counsel likened plaintiff's failure to make her employees show up on time to the conduct of this dismissed juror, making statements like, "it ruins their moral [sic]," "he was asleep on the job," "you may be a little resentful of that," and "if that gentleman [were] still here, and think if that would create some hard feelings, how that would affect your ability to work together as a team, to come up with a verdict in this case."

After reviewing the record we find that instead of attacking plaintiff's credibility, defense counsel attacked plaintiff personally, and did appeal to the jurors' self-interest by comparing plaintiff's conduct to that of a juror dismissed for snoring. This was plain error affecting plaintiff's substantial rights. *Kubisz, supra,* 236 Mich App at 637.

Plaintiff next argues the trial court erred by allowing defense counsel to make unsubstantiated insinuations that one of plaintiff's witnesses was untrustworthy. We disagree. Again, because this issue was not properly preserved, reversal is not warranted absent plain error affecting plaintiff's substantial rights. *Kubisz, supra* at 637.

In this case, defense counsel established during cross-examination that while working for defendant company, the witness' worker's compensation claim was denied. The witness also stated that she was forced into stepping down from her position as assistant manager. Counsel may comment on a witness' bias. *Reetz, supra* at 109. It is proper to claim fabrication where the testimony of a plaintiff's witness directly contradicts a defendant's witness. *Id.* at 109. Also, where there is conflicting testimony, counsel may try to persuade the jury to believe counsel's witness and disbelieve the opposing counsel's witness. *Kubisz, supra* at 641. Therefore we find no error.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Donald S. Owens